U.S COURT OF APPEALS
FILED
JAN 13 1995
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50339
Summary Calendar

Larry P. Spierer, *Plaintiff-Appellee*,
versus
Evans Incorporated, *Defendant-Appellant*.

Appeal from the United States District Court
for the Western District of Texas
(SA-91-CV-1132)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Evans, Inc., the former employer of Larry Spierer, appeals an adverse jury verdict, contending that the district court's charge and an interrogatory submitted to the jury misstated the applicable standard a plaintiff must prove in an age discrimination action, and, thus, constitute reversible error. We AFFIRM.

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Spierer brought an action pursuant to, *inter alia*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* Under the ADEA, it is unlawful for an employer "to discharge any individual . . . because of such individual's age," provided that the individual is "at least 40 years of age." 29 U.S.C. §§ 623(a)(1), 631(a).

Following a four day trial, the district court included the following in its jury instructions:

> The plaintiff must prove by a preponderance of the evidence each of the following:
>
> (1) That he was between the ages of forty (40) and seventy (70);
>
> (2) That he was discharged; and
>
> (3) That his age was one of the reasons the defendant discharged him. He need not prove that age was the only reason.

Accordingly, the verdict form contained the following interrogatory: "Do you find from a preponderance of the evidence that the plaintiff's age was one of the reasons the defendant discharged him?" Neither party objected to the instruction or interrogatory.

II.

Evans focuses on the language that required the jury to find age as being "one of the reasons" for discharge; it contends that the jury was required instead to find age to be "a determinative factor" in the discharge decision.

The standard of review for jury instructions is usually whether the charge, as a whole, is a correct statement of the law and plainly instructs the jurors as to the principles of law applicable to the factual issues confronting them. *United States v. Chen*, 913 F.2d 183, 186 (5th Cir. 1990) (citations omitted). But, when, contrary to Fed. R. Civ. P. 51, the appellant did not object at trial to the charge, the appellant must establish the instruction (1) was an incorrect statement of the law, and (2) was probably responsible for an incorrect verdict leading to a substantial injustice. *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537, 540-41 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *see* Fed. R. Civ. P. 61. In other words, for this strict standard, we review the charge to determine if the error was so fundamental as to result in a miscarriage of justice (fundamental error). *Branch-Hines v. Hebert*, 939 F.2d 1311, 1319 (5th Cir. 1991).

A.

Before addressing fundamental error *vel non*, we turn to Evans' attempt to excuse the lack of objection to the instruction. Rule 51 provides, in part, that

> [n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Fed. R. Civ. P. 51. Evans intimates that a less stringent standard of review should be applied because the dis-

trict court did not provide the opportunity to object. We disagree.[2]

B.

We turn now to the two prongs for our fundamental error review.

1.

As for the first prong (instruction an incorrect statement of the law), Evans states correctly that Spierer's burden under the ADEA was "to show that his age was a determinative factor in [Evans'] decision to fire him, and that the court's instruction was required to 'convey to the jury [this] legal standard. . . .'" *Haring v. CPC Int'l, Inc.*, 664 F.2d 1234, 1239 (5th Cir. 1981) (second alteration in original) (*quoting Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979)). The requirement that age be a determinative factor "requires more than a jury finding that 'age was a factor that affected the [discharge] decision.'" *Id.* (*quoting Loeb*, 600 F.2d at 1019).

Obviously, although the district court has broad discretion in its composition of jury instructions, they must be fundamentally accurate and not misleading. *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 125 (5th Cir. 1992). As noted *supra*, we cannot, however, confine our focus to the isolated phrases that Evans challenges; we must consider the instructions as a whole. *Federal Deposit Ins. Corp. v. Mijalis*, 15 F.3d 1314, 1318 (5th Cir. 1994).

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[2] In *Cosper v. Southern Pac. Co.*, 298 F.2d 102 (9th Cir. 1961), a party sought to justify its lack of objection to an instruction on the same ground as Evans. In rejecting the contention, the court did not interpret the "opportunity to object" provision of Rule 51

In addition to the challenged phrase, the district court also instructed the jury as follows: "If and only if you find that age was a determining factor in the defendant's decision to terminate the plaintiff, you must determine from a preponderance of the evidence whether the defendant acted willfully." Spierer suggests that this instruction, in addition to the standard instruction "not to single out one instruction alone, as stating the law, but . . . [to] consider the instructions as a whole," mitigates any error that may have occurred. But, the former instruction does not clarify or rectify the "one of the reasons" language. On the verdict form, the final interrogatory queried, "Do you find from a preponderance of the evidence that defendant's decision to discharge the plaintiff because of his age was willful?"; the jury answered "No." Read together with the accompanying

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to mean that the judge must invite criticism of his instructions. If counsel desires to object he should so indicate. He could say, 'May we approach the bench?' or 'We desire to discuss a matter with the court' or any one of a number of statements that would indicate to the court that he desired to make an objection.

. . .

. . . [W]e see no reasons to relieve counsel from the requirement to make known his desire to object to the court's instructions before the retirement of the jury. We, therefore, hold that counsel must indicate in some manner before the jury retires that he desires to make an objection to the instructions before he can successfully contend that the court has failed to comply with the provisions of Rule 51.

Id. at 104. Although in *Swift v. Southern Ry.*, 307 F.2d 315 (4th Cir. 1962), the Fourth Circuit addressed the failure of a court to seek, on its own initiative, objections to its instructions, it did not hold that the district court was required to inquire whether objections exist; the court described such a procedure as being simply "the desirable practice." *Id.* at 320. Later, the court suggested, but did not hold, that if the charge as given was objectionable and prejudicial then reversible error would exist.

instruction, the basis for the jury's "No" response is unclear; either the jury determined that Evans' conduct was not willful, or it found that the precedent condition ("[i]f and only if you find that age was a determining factor") was not satisfied. In light of the context in which the "one of the reasons" and the "determining factor" language was used, the jury could reasonably infer that they constituted separate and distinct standards, not that the latter clarified the former.

Therefore, for purposes of this opinion, we assume that the jury instructions and interrogatories, taken as a whole, failed to convey the appropriate legal standard in an accurate and clear manner. Accordingly, we turn to the second prong of our fundamental error review: whether the instruction was probably responsible for an incorrect verdict leading to a substantial injustice.

2.

In resolving the second prong, we must determine whether a properly charged jury could have found "some evidence" to support its verdict, *Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950, 957 (5th Cir. 1993); in doing so we do not, however, engage in a sufficiency of the evidence review.

"Because direct evidence is rare in discrimination cases, a plaintiff ordinarily uses circumstantial evidence and inferences therefrom to satisfy [his] burden of persuasion." *Rhodes v. Guiberson Oil Tools*, ___ F.3d ___, 1994 WL 658858, at *14 n.8 (J. Emilio Garza, dissenting). "The accumulation of circumstantial evidence more than meets the 'any evidence' requirement of the plain [fundamental] error standard." *Purcell*, 999 F.2d at 957.

At the time of his discharge, Spierer, age 43, had been working for Evans for 12 years, eventually becoming manager of Evans' store in San Antonio, Texas. Spierer presented evidence that when Evans terminated store managers over age 40, general statements were given as the reason; managers under the age of 40 were given more descriptive justifications. For example, Spierer identified three former managers, all over age 40, for whom the stated reason for termination was either "not meeting company expectations" or "performance"; the reason for Spierer's termination was "not meeting company expectations." This is in contrast to the reasons given for two terminated managers under the age of 40. One was terminated because his "store [was] not showing results. Need change in [management] direction." The reason given for the other, whom Evans admitted was actually discharged because of sexual harassment, was "mismanagement: corporate dissatisfaction with management ability & leadership skills."

Additionally, Spierer introduced performance evaluations covering his last five years at Evans. All of the evaluations listed Spierer's performance as satisfactory or above; Evans raised no concerns with respect to that performance. On the last evaluation, conducted just over a year prior to Spierer's termination, his performance in 15 of 16 areas was graded as "above average" or "excellent"; seven of these areas contained marks higher than the previous year, while only one area was lower. In attempting to justify Spierer's dismissal, Evans presented evidence that a month prior to his termination, Spierer's new supervisor visited the San Antonio store

and discovered problems that indicated that the store was not run properly.

As stated, for this prong of fundamental error review, our task is not to reweigh the evidence. Instead, we must simply determine whether Spierer presented some evidence from which a jury could conclude that age was a determinative factor for his discharge. We conclude that he did; therefore, Evans has not demonstrated the requisite fundamental injustice resulting from the incorrect instruction.

III.

For the foregoing reasons, we

AFFIRM.

FILED
MARCH 03 1994
By Deputy: /s/ [Not Legible]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-91-CA-1132

Larry P. Spierer, *Plaintiff*
vs.
Evans Inc., *Defendant*

VERDICT FORM

QUESTION NO. 1:

Do you find from a preponderance of the evidence that plaintiff's age was one of the reasons the defendant discharged him?

Answer "Yes" or "No":_____[Yes]_____

If you did not answer "yes" to Question No. 1, then do not proceed. If you answered "yes" to Question No. 1, then proceed.

QUESTION NO. 2:

What amount of back pay damages, if any, has plaintiff incurred as a result of defendant's decision to discharge him?

Answer: $_____[74,764.28]_____

QUESTION NO. 3:

Do you find from a preponderance of the evidence that defendant's decision to discharge the plaintiff because of his age was willful?

Answer "Yes" or "No": [No]

SO SAY WE ALL:

Date: [3/3/94] Foreperson: [/s/Not Legible]